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Sri Lankan Presidential Commission of Inquiry (2007): Did It Amount to a Fair Hearing?

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SRI LANKAN PRESIDENTIAL COMMISSION OF INQUIRY (2007): DID IT AMOUNT TO A FAIR HEARING?*

COMISIÓN PRESIDENCIAL DE INVESTIGACIÓN ESRILANQUESA (2007): ¿LLEGÓ A SER UNA AUDIENCIA JUSTA?

Sujith XAVIER**

RESUMEN: En este artículo, el objetivo es estimar de manera coherente el procedimiento de la reciente Comisión Presidencial de Indagación esrilanquesa, y se aporta una crítica legal sustantiva del conflicto de intereses que ha perjudicado a la Comisión.
Palabras clave: Comisión de Investigación, violaciones de derechos humanos, fiscal general esrilanqués, conflicto de intereses, audiencia justa.

ABSTRACT: In this paper, the aim is to assess the procedure of the recent Sri Lankan Presidential Commission of Inquiry and to provide a substantive legal critique of the conflict of interest that troubled the Commission.
***Descriptors**: Commission of Inquiry, violations of human rights, sri lankan attorney general, conflict of interests, fair hearing.*

RÉSUMÉ: Cet article examine d'une manière cohérente la procédure de la récente Commission Présidentielle d'Enquête de Sri Lanka et il apporte une critique légale substantive du conflit d'intérêts qui a caussé un dommage.

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SUMMARY: I. *Introduction*. II. *Presidential Commission of Inquiry*. III. *Conflict of Interest*. IV. *A Fair Hearing?* V. *Conclusion*.

I. INTRODUCTION

The President of the Democratic Socialist Republic of Sri Lanka, His Excellency Mahinda Rajapaksa, mandated the 2007 Presidential Commission of Inquiry ("CoI").[1] The creation of the CoI signaled a shift in the current government's policy towards the ethnic conflict that had plagued the Island since the late 70's. In June 2009 however, the Government of Sri Lanka did not renew the Commission's mandate, particularly in light of the recent calls for an international investigation into the alleged commission of war crimes during the military operation against the Liberation Tigers of Tamil Eelam (LTTE).[2]

This paper does not offer theoretical insights into the meaning and scope of the Commission of Inquiry or the best method to end impunity for international crimes,[3] but rather in a more menial way points to the inherent contradictions in the efforts to end impunity within the Sri Lankan conflict, especially with the acquiescence of the international community. The Commission of Inquiry set up by the Sri Lankan President, it will be argued, did not meet the fair hearing threshold established by the common law,[4] the Sri Lankan jurisprudence and international human rights law. Granted, the CoI is much more akin to a truth commission, yet its implementing statute compels it to act in a judicious manner. The Commission is bound to act in a judicious manner, as set out by section 9 of the Presidential Commissions of Inquiry Act and therefore the frame of fair hearing is the optimal lens.

1 Section 2, The Presidential Commissions of Inquiry Act No. 17 of 1948 [CoI Act, 1948].

2 Canadian Broadcasting Corporation (CBC), "Sri Lanka ends inquiry into rights abuses", online: CBC *http://www.cbc.ca/world/story/2009/06/16/srilanka-inquiry-human-rights016.html*; Heilprin, John, Globe and Mail, "UN chief calls for war-crimes investigation in Sri Lanka", online*:http://www.theglobeandmail.com/news/world/un-chief-calls-for-war-crimes-investigation-in-sri-lanka/article1172281/*.

3 Article 5, 6 and 7 of Rome Statute of the International Criminal Court, 37 *ILM* 999, 1998.

4 In this regard, attention will be paid to Canadian and British case law.

Sri Lanka, briefly, is a former colony and is allegedly one of South Asia's worst examples of democratization. Like many other former colonial states, the 18% Tamil minority's disenfranchisement fuelled one of the most disastrous conflicts[5] resulting in the death of approximately 120,000 and the displacement of over 600,000.[6] In May of 2009, the Sri Lankan Forces defeated the LTTE and supposedly ended the conflict. Notwithstanding the cessation of hostilities, approximately 300,000 Tamils continue to live in refugee camps.[7]

Human rights groups and civil society organizations have maintained that the CoI and its international monitoring body, the International Independent Group of Eminent Persons ("IIGEP") were appointed by the President as a result of mounting international pressure, and to placate international donors.[8] Historically, the previous Presidential Commissions of Inquiries have had a significant role in Sri Lankan politics. Numerous Presidential Inquiries dealt with various aspects of the conflict.[9]

All of the Presidential Commissions of Inquiry have often operated in the margins; the political will to end impunity thus is often lacking, and therefore, the current Commission was set up with the ability to solely make recommendations and provide compensation in accordance with the enabling legislation. The Bindunuwewa Massacre is a clear illustration: Recommendations made by the Commission mandated to investigate the alleged crimes were followed (to prosecute those responsible for the massacre). The accused were tried at law, but the Supreme Court of Sri Lanka, for want of evidence, overturned the decision of the

5 De Mel, Neloufer, *Militarizing Sri Lanka: Popular Culture, Memory and Narrative in the Armed Conflict*, New Delhi, Sage Publications, 2007.

6 *Idem*; Ethirajan, Anbarasan, "Winning the peace in Sri Lanka", BBC Online*: http://news.bbc.co.uk/2/hi/south_asia/8056734.stm*, accessed on May 19, 2009; BBC, Agony in Sri Lanka's refugee camp, BBC Online *http://news.bbc.co.uk/2/hi/south_asia/8065594.stm*, accessed on May 24, 2009.

7 *Idem*.

8 Nord, Adam, "Civil Society Involvement at the Commission of Inquiry", *Beyond the Wall*, 2009 [Forthcoming] [Copy on file with Author].

9 Numerous Presidential Commissions of Inquiries were set up by past governments including: Vaskeralingam Commission; Sansoni Commission (1972-1973); Koka dichlai Commission; Sharavanada Commission (1981-1983); Three Commissions on Disappearances (Suntheralingam Commission, Palakidner Commission, Muttetuwegama Commission); The Commission of Inquiry into the Involuntary Removal or Disappearance of Certain Persons (All Island 1998); Bindunuwewa Commission.

lower courts.[10] Human rights organizations often therefore take a critical view of the CoI process, denigrating it as lacking in transparency and accountability. The recent Commission, sadly, was no different.

IIGEP was dissatisfied with CoI on a number of key issues: including witness and victim protection, the involvement of the Attorney General's Office (conflict of interest), lack of transparency and timeliness in the proceedings. In this paper, the aim is to coherently assess the procedure of the recent CoI and to provide a substantive legal critique of the conflict of interest that troubled the Commission, which ultimately resulted in the withdrawal of the IIGEP as the monitoring body.

The first part of this paper will set out the contours of the Commission and its mechanics. The second component will examine some of the main contentious issues that impeded the true potential of this endeavor. The role of the Attorney General ("AG") will be examined and the empowering mechanisms will be set out. In conclusion, a case for the existence of the apparent bias will be made, not because of the 'actual and legal' role of the AG, but because of the *practical realities* of Sri Lanka.

II. Presidential Commission of Inquiry

In November 2006, the President appointed eight Commissioners.[11] He authorized them to obtain information, investigate and inquire "into 16 incidents[12] of alleged serious violations of human rights in Sri Lanka

10 Keenan, Alan, "Making Sense of Bindunuwewa: From Massacre to Acquittal", *Law and Society Trust Review* (*LST*), vol. 15, issue 212, June 2005, 19-42.

11 Hon. N. K. Udalagama Esq. (Judge, Supreme Court of Sri Lanka), U. Yapa Esq., Dr. D. Nesiah (resigned), K. C. Logeswaran Esq. (resigned), M. K. Muttetiwegama, J. Ismail, S. S. Wijeratne and A. J. Yusuf Esq.

12 Case No. 1: The Assassination of the Foreign Minister of Sri Lanka Hon. Lakshman Kadirgamar, PC; Case No. 2: The killing of seventeen (17) aid workers of the international non governmental organization Action Contra La Faim. in early August 2006; Case No. 3: The alleged execution of Muslim villagers in Muttur in early August 2006 and the execution at Welikanda of 14 persons from Muttur who were being transported in ambulances; Case No. 4: The assassination of Mr. Joseph Pararajasingham, Member of Parliament on 25th December 2005; Case No. 5: The killing of (five) 5 youths in Trincomalee on or about 2nd January 2006; Case No. 6: The Assassination of the Deputy Director General of the Sri Lanka Peace Secretariat Mr. Ketheesh Loganathan on 12th August 2006; Case No. 7: Death of fifty one (51) persons in Naddalamottankulam (Sencholai) in August 2006; Case No. 8: Disappearance of Rev

since 1 August 2005" and to "examine the adequacy and propriety of the investigations already conducted".[13] The powers of the Commission are set out in section 7 of the Commission of Inquiry Act.[14] Section 7 (b) empowers the Commission to acquire evidence, either oral or written, and in doing so to act similar to that of a court of law.

The Warrant issued by the President requires the final report of the CoI to be forwarded to the relevant authorities, including "the Attorney General, to initiate necessary action to implement the recommendations of the CoI including the institution of criminal proceedings".[15] The President, additionally, invited eleven persons of international repute to form the International Independent Group of Eminent Persons.[16] The IIGEP was called on to observe the work of the Commission and to comment on the transparency of the investigations and inquiries, and to ensure conformity with international norms and standards.

Within the schedule of the Warrant, the President identified sixteen specific crimes and requested the Commissioners to provide recommendations on: facts and circumstances pertaining to each of the incidents; descriptions, nature and backgrounds of the victims and the circum-

Nihal Jim Brown of Philip Neri's Church at Allaipidi on 28th August 2006; Case No. 9: Killing of five (5) fishermen and another at Pesalai beach and at the Pesalai Church on 17th June 2006; Case No. 10: Killing of thirteen (13) persons in Kayts Police area on 13th May 2006; Case No. 11: Killing of ten (10) Muslim villagers at Radella in Pottuvil police area on 17th September 2006; Case No. 12: Killing of sixty eight (68) persons at Kebithigollewa on 15th June 2006; Case No. 13: Incident relating to the finding of five (5) headless bodies in Avissawella on 29th April 2006; Case No. 14: Killing of thirteen (13) persons at Welikanda on 29th May 2005; Case No. 15: Killing of ninety eight (98) security forces personnel in Digampathana, Sigiriya, on 16th October 2006; Case No. 16: Assassination of Mr. Nandarajah Raviraj, Member of Parliament on 10th November 2006.

13 The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations, "The Mandate" online: The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations, *http://www.pchrv.gov.lk/full_mandate.html* [CoI Mandate].

14 CoI Act, 1948, *supra* note 1.

15 The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations, online: The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations *http://www.pchrv.gov.lk/index.html* [CoI].

16 International Independent Group of Eminent Persons (IIGEP), online: IIGEP *www.iigep.org* [IIGEP].

stances which may have led to or resulted in the deaths and/or torture of those affected; identities, descriptions and backgrounds of persons and groups of persons, who are responsible under the applicable laws and legal principles of Sri Lanka, for the commission of deaths, injury or physical harm to any person during, in the course of, or as a result of, any of the incidents investigated and inquired into by the Commission of Inquiry; the relevant circumstances and possible reasons that may have influenced or been relevant to the conduct of investigations, examine and comment on the nature, propriety and efficacy of the investigations conducted into the incidents investigated and inquired into by the Commission of Inquiry; recommend measures that should be taken in accordance with the laws of Sri Lanka against the perpetrators; recommend appropriate measures of reparations to be provided to the victims and next-of-kin.[17]

Armed with this mandate, the appointed Commissioners then set up the Commission through the Structure & Rules of Procedure, adopted in January 2007 and subsequently amended in April 2007.[18] Accordingly, the Commission is composed of the Seven members and the Chair, along with the Secretariat,[19] Counsel from the Official Bar,[20] Counsel from the Unofficial Bar,[21] Panel of Investigators, Security Unit, Victim and Witness Assistance and Protection Unit and Panel of Expert Consultants. Under section 16 of the Commission of Inquiries Act, standing could be afforded to those whose "conduct is the subject of the inquiry, or who is

17 CoI Mandate, *supra* note 13.

18 CoI, *supra* note 15.

19 The main role of the Secretariat is: Logistical requirements including venue of Sessions of Inquiry, office rooms, stationary, transport, and secretarial assistance; Financial resources (arranged through the Presidential Secretariat); Subordinate staff; Wages and Allowances; Interpretation and Translation Services; Recording of proceedings and preparation of transcript and Any other facility or service to be provided as may be directed by the Commission; *idem*.

20 The Official Bar consists of officers of the Attorney General's Department and are appointed by the Commission based on nominations of the Attorney General. See Generally rules of Procedure; CoI, *supra* note 15.

21 Counsel shall be appointed by the Commission from amongst Attorneys at Law of the Unofficial Bar; *idem.*

in any way implicated or concerned in the matter under inquiry".[22] Significantly, the Commission has granted standing to some of the key governmental institutions and officials implicated in the hearings. For example, in the ACF hearing, the Commission had granted standing to the Sri Lankan Army and in the Trincomalee case, it has granted standing to the Special Task Force of the Sri Lankan Police. Similarly, the Commission had granted standing to Civil Society Members (seven civil society members)[23] and to the victims.

The Commission's rules of Procedure additionally set out the method in which the inquiry will be undertaken. Rule 2.1 requires the Secretariat to advertise the existence of the Commission in the local media and inform the public to provide evidence to the Commission.[24] Based on the information that is received, the Commission then must decide the best appropriate measure, and the Panel of Investigators ought be utilized to gather the information. Furthermore, Rule 2.4 enables the Commission to receive the reports of the 16 criminal investigations into the 16 incidents identified in the Schedule to the President's enabling mandate, already conducted by the Inspector General of Police.[25] Based on these reports, the Commission, according to Rule 2.5 to 2.9 may call for further evidence and conduct the mandated inquiry.

As of August 30, 2008 (almost two years after its creation), the Commission had commenced its inquiry into two different incidents: the killing of seventeen (17) aid workers of the international non-governmental organization Action Contre La Faim (ACF) in August of 2006 and the killing of five (5) youth in Trincomalee on or about 12th August

22 CoI Act, 1948, *supra* note 1; Adam Nord, "Civil Society Involvement at the Commission of Inquiry" *Beyond the Wall*, 2009 [Forthcoming].

23 Centre for Policy Alternatives, Home for Human Rights, Law and Society Trust, Inform, Civil Monitoring Commission Free Media Movement, International Movement Against Racism.

24 Structure & Rules of Procedure 2.1, The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations, online: The Presidential Commission of Inquiry to Investigate and Inquiry into Serious Human Rights Violations, *http://www.pchrv.gov.lk/index.html* [CoI Structure & Rules of Procedure].

25 *Idem*; rule 2.4 furthermore outlines the contents of the report to be submitted by the Inspectors General- the name of the investigating agency, identities of the investigators, synopsis of the investigations conducted, material collected, observations and comments of the investigators and current status of the investigations and judicial proceedings.

2006. By June 2009, it had investigated seven of the 15 incidents; yet, sadly, the final report of the commission has not been made public.

III. Conflict of Interest

The mechanics of the Commission of Inquiry and its observing body illustrate the complex nature of the endeavor envisioned by the President of Sri Lanka. Yet one key aspect of the inquiry rendered the whole enterprise questionable. Section 3 of the Organizational Structure and Rule of Procedure enables the Counsel from the Official Bar to provide assistance to the Commission.[26] More crucially, the Official Bar was comprised of officers from the Attorney General's Office (AG): a department within a governmental ministry with its own enabling legislation. These legal officers are to be appointed on the recommendation of the Attorney General by the Commission to:

> assist the Commission in supervising, guiding and advising the conduct of investigations;
> assist the Commission by presenting evidence at Sessions of Inquiry;
> assist the Commission by advising on questions of law;
> suggesting to the Commission further investigations and inquiries to be conducted;
> and any other matters assigned to the Panel of Counsel by the Commission.[27]

The Commission additionally includes Counsel from the Unofficial Bar, through Section 1.3A of the Structure and Rules of Procedure. The Counsel from the Unofficial Bar is appointed by the Commission from a pool of practicing attorneys within Sri Lanka and these Counsels perform such functions as stipulated by the Commission.[28]

Obviously, the institutional 'hybrid' model created in this instance is rather peculiar and it has been subject to severe criticisms. These claims

26 *Ibidem*, Section 3.
27 CoI Structure & Rules of Procedure *supra* note 24.
28 *Idem.*

are steeped in one simple fact: the AG's office has been and ought to have been involved in the previous criminal investigations of the 16 incidents.[29] IIGEP, in its first statement released in June of 2007 states:

> We are concerned about the role of the Attorney General's Department… The [AG]'s Department is the Chief Legal Adviser to the Government of Sri Lanka. Members of the [AG]'s Department have been involved in the original investigations into those cases subject to further investigation by the Commission itself.[30]

In its final report giving the reasons for the termination of its mission, IIGEP particularly notes the involvement of the Attorney General's Department. The report delivers a decisive blow to the CoI's decision to create a hybrid system:

> An officer (Deputy Solicitor-General) of the Attorney General's Department has taken a leading role in two of the four cases before the Commission so far, by way of acting as lead counsel in the questioning of the witnesses. At the same time, the Attorney General is the legal adviser to the Government and must protect the interests of the Government when actions by its organs, including the police and the armed forces, are called into question.[31]

To note, the role of the Sri Lankan AG's office is apolitical, as instituted by Statute and jurisprudence. However, practically speaking, it is not. The following section will set out the role of the AG in the current system and then will layout the practical realities, focusing on the ACF case from Muttur.

29 Pinto-Jayawardena, Kishali, "Public Accountability of the Attonrney General - To What Extent Should the Exercise of his Statutory Powers be Reviewed by Court?", *LST Review*, 15 (211) 2005 [Pinto-Jayawardena]; Land Reform Commission *vs*. Grand Central Limited [1981] 1 SLR 250; Sri Lanka Constitution 1978 (Certified on 31 August 1978).

30 IIGEP *supra* note 9, Statement June 11, 2007.

31 *Idem*.

1. *AG's office within the legislative framework; Jekyll and Hyde*[32]

The President of Sri Lanka, subject to the approval of the Constitutional Council,[33] appoints the Attorney General, and the subsequent removal of the Attorney General is also subject to legislation, similar to the removal of judges.[34] The AG's powers are wide in scope; originally, the office holder is the chief law officer of the state with an independent department. Historically, the AG's role within the governmental machinery has been fragmented; the 1978 Constitution and 17th Amendment further clarified the role. It is essential to note that the AG's office is a neutral body, with specific powers to safeguard public interest. In the Land Reform Commission *vs*. Grand Central Limited, Chief Justice Samarakoon notes: "[AG] is the Chief Legal Officer and Adviser to the State and thereby to the Sovereign and is in that sense an officer of the public".[35]

The Attorney General's Department currently sits within the Ministry of Justice and Law Reform of Sri Lanka.[36] According to the Ministry's website, the AG's office is concerned with the "institution and defense of civil actions for and on behalf of the Republic, Ministers and Public Officers and the institution and conduct of criminal proceedings for and on behalf of the Republic".[37] Broadly, the Attorney General's powers are conferred through Section 77 and 134 of the Constitution of the Democratic Socialist Republic of Sri Lanka, the Code of Criminal Procedure ("CCP") and common law. The constitutional provisions allow the AG "the right to be heard in all proceedings in the Supreme Court in respect of constitutional matters, of bills both ordinary and urgent, of the interpretation of the constitutional provisions".[38]

The CCP however, is more useful for the current analysis and details the powers of the AG within the criminal justice system. In Part IX, Sup-

32 Land Reform Commission *vs*. Grand Central Limited [1981] 1 SLR 250 [Land Reform Commission].

33 17th Amendment, Sri Lanka Constitution 1978 (Certified on 31 August 1978).

34 Article 54, Sri Lanka Constitution 1978 (Certified on 31 August 1978).

35 Land Reform Commission, *supra* note 24.

36 Ministry of Justice, Sri Lanka Government, online: Sri Lanka Government, *http://www.justiceministry.gov.lk/departments_and_institutions_ass.htm*.

37 Department of the Attorney General, Sri Lanka Government, online: Sri Lanka Government, *http://www.justiceministry.gov.lk/dept/attorney.htm*.

38 Pinto-Jayawardena *supra* note 21 at 4.

plementary Provisions, Section 393 (1), outlines the procedure to be followed by the Attorney General. In particular subsection 1(c) states: "in any case referred to him [AG] by a State Department in which he considers that criminal proceedings should be instituted".[39] Subsection 2 additionally requires the Attorney General to provide advice, on his own accord or by the request of a State Department to public officers, officers of the police and officers in the corporation in any criminal matter of importance or difficulty. Further, Section 135 of the *CCP* sets out the conditions necessary for the initiation of prosecutions for certain offences. Therein it states that "any court shall not take cognizance" of any offence except with the previous sanction of the AG".[40] More interestingly, once a police investigation has been conducted (if the crime is cognizable), then the AG's department as part of the Government machinery must indict the accused before the Courts.[41]

From the preceding legislative analysis, the AG's role in conducting investigations and indicting the accused is quite visible. Ultimately, his role is intricate, and even though his role commences upon the completion of the investigation, it is nonetheless part of the investigation. The AG does not have a role in directing the investigations, but rather state officers can seek the advice of the AG's office during the investigation or the AG can provide advice on his own accord.[42]

Section 3 of the AG's response to IIGEP statement deals with this apparent conflict of interest; he sets out the reasons why the conflict of interest ought not be a hurdle in fulfilling the Commission's mandate. The Attorney General reiterated certain matters of 'fundamental importance' as to the nature of the Office of Attorney General. He asserted that his office is *not* a political institution, but rather a statutory body amenable to the judicial review and finally stipulates categorically that his department is not involved in the criminal investigations but rather is engaged only on an advisory level upon request.[43] Furthermore, the AG clarified that the Warrant creating the Commission did not give the Com-

39 Code of Criminal Procedure Act of 1979.

40 *Idem*.

41 *Idem*.

42 *Ibidem*, S. 393 (2).

43 Attorney General of Sri Lanka's response to the 6th IIGEP statement; IIGEP *supra* note 16.

mission a mandate over the role of the AG's office, and more importantly dealt with conducted investigations. For these reasons, he was of the opinion that the role of his Legal Officers in the CoI did not create a conflict of interest and the set up is optimal as it complies with the typical role of the AG.[44]

2. *Multiple identities of the AG*

The role of the AG as an impartial entity, which seeks to maintain the public interest is a legal fiction. In reality (which is what IIGEP ought to have identified specifically in its statement),[45] the AG's office is complicit in state sponsored human rights violations and at times goes out of its way to ensure that the state is not implicated. This is illustrated in the case of the killing of the 17 aid workers (ACF) in Muttur.

The Sri Lankan Ministry of Justice, relying on a decision by the Judicial Service Commission, interfered with the original investigation in the ACF Muttur case, headed by the Trincomale Magistrate, Mr. Manickavasagar Ganesharajah. Ironically, the Magistrate Ganesharajah was to deliver his verdict from the inquest on the 5th of September 2006, but rather delivered the notice that the case would be transferred to Magistrate Jinadasa in Anuradhapura. The reasons for the transfer request by the Ministry are unknown and speculative. The Muttur Magistrate allegedly would have implicated the military personnel and other Sri Lankan forces.[46]

In this regard, the AG's office, as part of the governmental machinery and more explicitly, as part of the Ministry of Justice, was implicated in the delay and cessation of the original investigation. Further, the Attorney General's Office allegedly attempted to dissuade witnesses from providing accurate evidence in the Welikade Massacre, which was also the subject of a Presidential Commission of Inquiry.[47]

44 *Idem*.

45 IIGEP *supra* note 16, Public Statement, 06 Mar 2008.

46 Pinto-Jawardena, Kishali, "Focus on Rights", *Sunday Times*, Sri Lanka, September 10, 2007; University Teachers for Human Rights (Jaffna) (UTHR), "From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay" (31st May 2007) Special report 25, online: UTHR, *http://www.uthr.org*.

47 University Teachers for Human Rights (Jaffna) (UTHR), "Scripting the Welikade Massacre Inquest and the Fate of Two Dissidents" (31st May 2007) Special report 25, online: UTHR, *http://www.uthr.org*.

To illustrate the complicity of the Attorney General's Office in protecting and or covering up human rights violations by the Sri Lankan forces, another case working its way in the Sri Lankan courts will suffice as an example. In Anthony Sathianathan *vs*. Superintendent of Prisons (and 6 others),[48] the petitioner was arrested on December 5th 2005 by the Sri Lankan Navy under Emergency Regulation[49] and Prevention of Terrorism Act,[50] along with his son, while setting off on a fishing expedition. The petitioner was then transferred to the Terrorist Investigation Department (part of the Sri Lankan Police force) on the 6th of December 2005, and was held in custody for three months. He was later produced before the Colombo Magistrate and had been in prison for the last 19 months, without any charges being filed against him. The Petititioner's legal counsel filed a fundamental rights application on Constitutional grounds (as there is no justification for the arrest and detention)[51] and was able to force an indictment against the accused.[52] The final indictment filled by the AG is based on licensing permits under the Fisheries Ordinance of Sri Lanka and is not related to any proscribed activities under Emergency Regulation and Prevention of Terrorism Act. In summary, the Petitioner was arrested under terrorism related provisions and is now being charged, after having spent approximately two years in prison, for having violated governmental fishing regulations. More importantly the ground forces in the conflict zones arrest and detain 'suspected terrorists' under the enabling regulations and parliamentary acts. Once these 'suspected terrorists' are in custody, it is the role of the AG to ensure that they stay there, even if the charges are frivolous.[53]

48 Anthony Sathianathan *vs*. Superintendent of Prisons (and 6 others), SCFR 254/07 [Copy on file with Author].

49 Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000 as promulgated in Gazette 1130/8 of 3 May 2000; and amendments promulgated to those concerning arrest and detention on 16 May 2000. A state of emergency has been in force in Sri Lanka nearly continuously since 1983.

50 Sri Lanka Prevention of Terrorism (Temporary Provisions) Act, No 48 of 1979 [Certified on 20 July 1979].

51 Article 13 (1), 13 (2) and 13 (4), Sri Lanka Constitution 1978 (Certified on 31 August 1978).

52 The fundamental rights claim is automatically withdrawn if an indictment is secured.

53 For an example of such an incident see Nallaratnam Singarasa *vs*. Sri Lanka, No. 1033/2001, U. N. Doc. CCPR/C/81/D/1033/2001.

These two examples illustrate the convoluted role of the AG as the actual reality, and not necessarily grounded in the legislative provisions.

IV. A Fair Hearing?

The existence of bias within any administrative tribunal would render its decision null and void; particularly within common law jurisdictions and the international human rights regime spearheaded by the United Nations. In this instance, the element of bias is evident within the CoI because of the practical reality: the real role of the AG's office. The mixed (hybrid) model adopted by the Commission is unlawful, both domestically and internationally, which ultimately discredits its important work. The crux of this paper will be articulated in this section. The previous sections identified the 'existence or mere appearance of bias' within the very structure of the commission, given the real role of the AG. From this launching point, this section will then argue that the Commission, given it enabling statutory requirement to 'act in judicious manner' is not acting judiciously and is consequently entertaining bias. The paper examines how common law jurisdictions (Canada, United Kingdom) and the Sri Lankan jurisprudence understand bias; then it will establish how the CoI does not meet these thresholds established at law within the three different jurisdictions given its duty to act in a judicious manner. It will then set out the international fair hearing requirements that the CoI is bound by and will demonstrate how the AG's involvement hampers its ability to satisfy the international human rights requirements that Sri Lanka is bound by. Importantly, the main thesis of this paper is to display the contradictions in having the AG's office involved in the CoI process, which ultimately denotes the flawed approach to ending impunity.

1. *Mandate of the Commission and the existence of Bias*

The original Warrant issued by the President of Sri Lanka requires that the Commission independently and comprehensively conduct investigations into the 16 incidents of serious human rights violations (since August 2005) and examine the adequacy and propriety of the investiga-

tions conducted by the State officials.[54] Given the mandate of the Commission, the involvement of the AG's office - even if one accepts it as being merely peripheral - taints the whole enterprise as being biased. As noted in the previous analysis, the role of the AG's office within any investigation in Sri Lanka is quite clear. The AG performs an important function: the department advises the relevant State departments and then, once the investigations are completed, takes charge of the prosecution of the alleged perpetrator (s) of the crime on behalf of the Sri Lankan State.

Notwithstanding, the President of Sri Lanka, in a letter dated November 2007 clarified his intentions and noted that the AG's Office ought not to be included in the investigation.[55] This was in response to the criticisms raised by IIGEP in its earlier public statements. The President's letter inexplicably was intended to silence the criticisms of the hybrid model adopted by the Commission. This, however, does not remove the inherent bias within the current Commission of Inquiry.

Traditionally, as in most commonwealth states, common law rules of natural justice prevails and Sri Lanka is no different, given its colonial past.[56] A key characteristic of a fair hearing before any judicial body is that the "decision-maker and the decision-making process not proffer any undue preferential treatment or be driven by preconceived notions".[57] This is an important aspect of any hearing, not only for those that are being investigated but also for the general public's confidence in the proceedings. The Commission's inability to render any decision that would affect any person's legal rights should not be justification; it must nonetheless act in a judicious manner as it is deemed to be a judicial proceeding.[58] The applicable principles are that of independence, impartiality and bias; it should be reiterated that these principles are applicable to the learned Commissioners, and to those that the Commissioners have

54 CoI, *supra* note 13.

55 Attorney General of Sri Lanka's response to the 6th IIGEP statement; IIGEP *supra* note 16.

56 Jayaratne, L. M., *Judicial Review of the Commissions of Inquiry: Comparative Study* (Nugegoda, Deepanee Printers and Publishers, 1995) at 1-10.

57 Jacobs, Laverne, "Independence, Impartiality and Bias" in Colleen Flood & Lorne Sossin eds. *Administrative Law in Context* (Toronto, Emond Motgomery, 2008) at 139.

58 Section 9, CoI Act, 1948, *supra* note 1; Section 2, Code of Criminal Procedure Act of 1979.

chosen to lead the investigation. As a side note, one of the parties given standing (the Sri Lankan Army) presented a motion against one of the Commissioners for his inherent bias; this resulted in the subsequent withdrawal of one of the Commissioners based on these principles of law.[59] Clearly, the CoI must comply with principles of natural justice; these principles were not met through the inclusion of the AG's office.

2. *The Commission as a quasi-judicial body*

The enabling Statute, the Commission of Inquiry Act of 1948, in section 9 clearly entrenches the Commission's duty to act in a judicious manner. Section 9 states, "and every inquiry under this Act shall be deemed to be a judicial proceeding within the meaning of the Penal Code".[60] Judicial proceeding is however not defined in the Penal Code, but rather the Code of Criminal Procedure, where section 2 states: "Judicial proceeding means any proceeding in the course of which evidence is or may be legally taken".[61] Additionally, the enabling statute in section 16 incorporates important tenets of the principles of natural justice. Therein, the act provides those that are implicated, either directly or indirectly, to have the right to a fair hearing by affording them with representation. The proceeding of the CoI, therefore amounts to a judicial proceeding and is subject to the principles of natural justice.

Furthermore, in Silva and Others *vs*. Sadique and Others, the Supreme Court of Sri Lanka examined the issue of whether Commissions set up under the Commission of Inquiry Act 1948 are subject to review by courts through section 140 of the Sri Lankan Constitution and are amenable to a Writ of Certorari. The decision reveals an interesting aspect of the CoI: the recommendations made by the body are not subject to judicial review as the decisions are not binding in nature and lack legal authority. However, in this instance, the question is not about the recommendations made by the CoI. Rather the question turns on whether the CoI, in having the AG's office as part of the official bar, is entertain-

59 Dr. Nessiah' resignation; Statement of Claim, Case No. 2: The killing of seventeen (17) aid workers of the international non governmental organization Action Contra La Faim in early August 2006, filed by Counsel for the Sri Lankan Army [Copy on file with the Author].

60 CoI Act, 1948, *supra* note 1.

61 Section 2, Code of Criminal Procedure Act of 1979.

ing bias? In Silva, Justice Samarawickrema notes: "It appears to me that before any body can make a finding that any person responsible for any of the matters the Commission was required to inquire into and report, it would be necessary that that body should give a fair hearing".[62]

The argument that the CoI is subject to the principles of natural justice is clearly laid out at common law, in conjunction with section 9 of the enabling statute. *Audi Alteram Partem* is therefore an essential aspect of a fair hearing and more substantively, since the CoI had decided to establish the hybrid model, it is bound by this principle. The question therefore turns on whether the CoI is able to apply the principles of natural justice, when the AG's office is spearheading the questioning of the witness, gathering evidence for example? Obviously not, there have been numerous accounts of witness harassment and intimidation.[63] Furthermore, the legal counsels are current employees of the AG's office and therefore they are investigating their own actions and the actions of their colleagues within the department and within the other State run departments.

3. *Rules of natural justice: comparative analysis*

According to the Canadian Supreme Court, "[I]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word impartial… connotes absence of bias, actual or perceived".[64] The test for bias was formulated in another Canadian Supreme Court case where Justice DeGrandpre states: "[w]hat would an informed person, viewing the matter realistically and practically —and having thought the matter through— conclude[?]".[65] In the United Kingdom, Lord Hewart in R. *vs*. Sussex Justice ex Parte McCarthy stated that "[A] a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not be done, but should manifestly and undoubtedly be seen to be done".

62 Silva and Others *vs*. Sadique and Others [1978.79.80] 1 SLR 166.

63 The author observed Case No. 2 and Case No. 5 for approximately two weeks during August 2008 as part of a two-month consultancy with Home for Human Rights, a Sri Lankan national legal advocacy organization.

64 R. *vs*. Valente [1985] 2 SCR 673 at para 15.

65 Committee for Justice and Liberty *vs*. National Energy Board [1978] 1 SCR 369, para. 394.

"Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".[66] In the recent years, the House of Lords reformulated the old test of real likelihood, real danger, reasonable suspicion and real possibility of bias into "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[67]

In the Sri Lankan context, there are two relevant cases, which address this very issue. In re. Ratnagopal,[68] the Court determined another Presidential Commission of Inquiry to be biased (set up under the Commission of Inquiry Act of 1948 to investigate irregularities in government contracts). Therein Justice T. S. Fernando states: "Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?".[69] Further, in Simon *vs*. Commissioner of National Housing, Justice Wimalaratne reiterated the dictum in Ratnagopal and elaborated that "in our view, [the principle enunciated] would also apply to persons complaining of bias on the part of a person acting in a quasi-judicial capacity".[70]

For instance, the Lead Counsel, in his capacity of assisting the CoI, chooses the type of evidence and the witness to be interrogated in the hearing. In terms of the two cases referred to earlier before the Commission, the AG's nominees are leading the questioning of witnesses. Witnesses including high-ranking police officers and home guards[71] are questioned by the Lead Counsel: the Lead Counsel's office would have had contact with those that conducted the previous investigations. Surprisingly, the argument that the previous relationship that existed between these individuals ceased once the CoI began its investigations is not a plausible response. Additionally, by following the current logic, there emerges a trend of bias. "An informed person, viewing the matter

66 R. *vs*. Sussex Justice ex Parte McCarthy [1924] 1 KB 256.

67 Re. Medicaments and Related Class of Goods (No. 2) [2001] 1 WLR 700 (CA) at para 85; Lawal *vs*. Northern Spirit Ltd [2003] UKHL 35.

68 [1968] 70 NLR 409.

69 [1968] 70 NLR 409 at para. 436.

70 Simon *vs*. Commissioner of National Housing [1972] 75 NLR 471.

71 The Civil Defence Force is the former Home Guard Service, a paramilitary force tasked as an auxiliary to the Sri Lankan Police. The activities relating to the Home Guard Service are set out under the Mobilization of Supplementary Force Act No. 40 of 1985. The local home guards come under the command of the local police.

realistically and practically - and having thought the matter through" would conclude the existence of bias, whether real or not. One only needs to understand the role of the AG within the governmental apparatus to decipher the close and real connection between the said office and those that conducted the original investigation.

4. *Mandate of IIGEP and international norms*

In the invitation to serve as a Member of an International Independent Group of Eminent Persons, Lalith Weeratunge, Secretary to the President sets out the terms of reference of the IIGEP.[72] It is clear from the first requirement that the IIGEP monitors the workings of the CoI "with the view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards pertaining to investigations and inquiries".[73] With this requirement, it is obvious that IIGEP *would* have and *ought* to have raised the issue of conflict of interest in terms of the participation of the AG's office in these proceedings at the very inception of its own involvement.

From an international law standpoint, the involvement of any governmental agency in a Commission of Inquiry, set up to investigate the adequacy of an investigation would seem contradictory. The International Covenant on Civil and Political Rights (ICCPR) in article 14 sets out the contours of a fair proceeding.[74] In General Comment 32, the monitoring body of ICCPR delineates the contours of the Convention and article 14.[75] In paragraph 18, the Human Rights Committee notes that the "notion of a tribunal in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".[76] In light of this interpretation, the author

72 IIGEP *supra* note 9; Mandate.

73 IIGEP *supra* note 9.

74 1966, 999 UNTS 171 [ICCPR].

75 General Comment 32, Human Rights Committee, 90 session, CCPR/C/GC/32, Geneva 9 to 27 July 2007.

76 *Idem*.

would argue that Commission of Inquiry as a body established by President through the Warrant whose function is judicial in nature lies within the ambit of the Convention, which Sri Lanka is party to.

The CoI ought to have acted Convention compatibly as it tried to fulfill its mandate. Article 14 stipulates… "[e]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal".[77] The Committee has noted that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The Committee lays out the principle of impartiality in Karttunen *vs*. Finland and states that "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[78]

Consequently, the argument regarding the conflict of interest can be set out in the following manner. The CoI, by using the AG's nominees in leading the interrogation of the witness, particularly in the ACF case, allowed itself to be prejudicial to one party and is in some sense allowed itself to harbour preconceptions. As noted above, the AG's role within the original investigations into these incidents are quite evident and having the same officials lead the questioning of witnesses undermines the veracity of the whole project. Essentially, the AG's Officer can at times lead the questioning in such manner as to deter blame away from state officials, including the AG's office. The involvement of the AG's office points to the possibility of the Commissioners harboring preconceptions. The whole point that is being made here is whether the investigation that is being conducted is fair and impartial. In this instance, the nuanced involvement of the AG's office would suggest that it was neither fair nor impartial.

V. Conclusion

The aim of this paper was to highlight the importance of rule of law, particularly when governments are undertaking strategies to end impu-

77 Article 14, ICCPR *supra* note 55.

78 Karttunen *vs*. Finland, Communication No. 387/1989, UN Doc. CCPR/C/46/D/387/1989 (1992).

nity. Given the conflict type situation in Sri Lanka and the years of mass atrocities, the drive towards accountability for the crimes committed by both state and non-state actors were welcomed. Nonetheless, the Commission of Inquiry did not fulfill its international expectation. Nor did it live up to the promises made to the local population and the victims of the 16 incidents by both the Sri Lankan government and the international community. As shown above, there are inherent contradictions within the CoI process. By way of a conclusion, this paper has identified the process instituted within the CoI and has revealed that it is biased because of the involvement of the Attorney General. The 'appearance' and 'a real possibility' of bias are not allowed within any judicious proceedings both domestically and internationally. Therefore, the involvement of the AG within this process is not allowed given the CoI's statutory requirement to act in a judicious manner.

More broadly, the existence of bias within the CoI speaks to what scholars in the past have pointed to: the real lack of coherency when international aspirations are implemented in developing countries.[79] Even though there was a clear impetus to end impunity by the international community, the reality on the ground does not reflect this drive. Thus the resulting realties of these international aspirations do not meet the existing legal threshold. The drive to ensure that those who commit mass atrocities and the subsequent proceedings are not enough; the proceedings must stand up to domestic and international procedural requirements. If these proceedings do not incorporate foundational domestic and international legal principles (for example the procedural requirements), then they become nothing more than half-hearted attempts to placate those affected and subsequently taints the moral fabric of the desire to end impunity. The need to end impunity and the actual achievement of this goal should not be disconnected. Far too often, the on–the-ground

79 Merry Engle, Sally, "Legal Pluralism", *Law & Soc' y Rev*. 869, 1988, 22 (5); Galanter, Marc, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law", *J. Legal Pluralism*, 1981, 19, 1; Falk Moore, Sally, "Law and Social Change: the semi-autonomous field as an appropriate subject of study", 7 *Law & Soc'y Rev*., 1973, 719-746; Rittich, Kerry, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social", 26 *Michigan J. Int'l L*. 199, 2004.

practicalities are ignored or forgotten and this erasure then leads to what has been highlighted in this paper. This reflects the law's violence on the ground[80] and more particularly the colonial tendencies of the desire to end impunity without paying attention to how it is achieved.[81]

80 Cover, Robert M., "Foreword: Nomos and Narrative", *Harv. L. Rev*. 4, 1983, 97.

81 Anghie, Anthony *et al*. (eds.), *The Third World and International Order: Law, Politics and Globalization*, Leiden, Martinus Nijhoff, 2003; Orford, Anne (ed.), *International Law and its Others*, Cambridge, Cambridge University Press, 2006; Chimni, B. S., "Third World Approaches to International Law: A Manifesto", 8 *International Community Law Review* 3, 2006; Mutua, Makau, "What is Twail?", *ASIL, Proceedings of the 94th Annual Meeting* 31, 2000; Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press, 2004; Rajagopal, Balakrishnan, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge, Cambridge University Press, 2003.